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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 491

UNITED STATES OF AMERICA, APPELLANT

v.

**INTERSTATE COMMERCE COMMISSION AND UNITED
STATES OF AMERICA**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of the Supreme Court of the United States, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered June 28, 1955, by a specially constituted three-judge district court, one judge dissenting, convened pursuant to 28 U. S. C. 2284, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The jurisdictional statement was served on the appellee on October 26, 1955.

STATEMENT

Appellant filed a complaint with the Commission on November 20, 1951, alleging that the railroads had refused to pay the Department of the Army for wharfage and handling services in connection with military freight for export moved over the Army Base piers at Norfolk, Virginia, in violation of Sections 1, 2, 3, and 6 of the Interstate Commerce Act (49 U. S. C. Secs. 1, 2, 3, and 6).¹ The claim was that the railroads had refused to make the same payment to the Army for providing its own wharfage and handling on Army freight that the railroads made to public pier operators for furnishing such services on commercial shipments. On June 1, 1953, the Commission issued its order and decision in the case (289 I. C. C., 49) finding that the failure and refusal of the railroads to absorb such wharfage and handling charges was not shown to have subjected the complainant to the payment of rates and charges which were unjust, unreasonable, or otherwise unlawful.²

¹ The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix hereto.

² This ultimate finding was based on the subsidiary finding that there was no tariff requirements that the Army be paid wharfage and handling on such shipments and that there was no difference in the treatment of Army freight as compared with other freight and that the refusal of the railroads to pay the claimed wharfage and handling charges is not unreasonable or discriminatory. (289 I. C. C., 61, 63, 64.)

The three-judge district court, one judge dissenting, sustained the Commission (132 F. Supp. 34), holding that the order is supported by adequate findings, which in turn are supported by substantial evidence, and that the plaintiff had not been subjected to any unlawful discrimination or to the payment of rates and charges which were, or are unjust, unreasonable or otherwise unlawful.

BACKGROUND OF THE PROCEEDINGS

At the beginning of World War II, the Army took over the Army Base Piers at Norfolk, Virginia, which formerly had been leased to private terminal operators, and conducted the operations for its own account. After World War II, the property was again leased to a private company and operated as a public terminal. One of the operators, Norfolk Terminals, Division of Stevenson & Young, Inc., was employed by certain of the railroads serving Norfolk as their agent to provide wharfage and handling. The railroads paid Stevenson & Young for the performance, among other duties at the base, of unloading export freight from cars to the extent that the Norfolk port carriers were obligated under their terminal tariffs to furnish such services (289 I. C. C., 54). Such payments were not allowances within the meaning of the Act. They were not required to be published in the rail tariffs

and were not subject to Commission regulation (289 I. C. C., 60-61, 64). During this period; Stevenson & Young operated the Base as a public terminal and military freight was accorded free wharfage and handling, the same as other freight (Tr. 243).

On May 1, 1951, the lease to Stevenson & Young was revoked, and the Base was returned to the Army to meet the needs of military traffic for the Korean War (Tr. 14). The Army, in turn, "sub-permitted" a portion of the Base to the Maritime Administration, which made certain space available to Stevenson & Young for use in commercial operations. At this portion of the Base, there were continued in effect the previous arrangements between Stevenson & Young and the railroads, under which all shippers, including the Army, would receive free handling services on shipments made thereover. The remainder of the Base was employed by the Army for its exclusive use and it ordered the carriers to deliver all shipments consigned to it into its possession and subject to its exclusive control at this portion of the Base (289 I. C. C., 60). Stevenson & Young were employed by the Army to unload its shipments at the Army's portion of the terminal. (289 I. C. C., 54.) The Commission found that the Army shipments were not handled by this concern as a public wharfinger, but only as a labor contractor. (289 I. C. C., 62.)

The railroads, since May 1, 1951, have had terminal facilities at Norfolk more than adequate to handle all the military traffic moving over the Army Base (289 I. C. C., 63):

ARGUMENT

Appellant's contention (Jurisdictional Statement, pp. 11-12) that the Commission erred in holding that it was neither unreasonable nor discriminatory for the railroads to refuse to pay for wharfage and handling on Army shipments (while paying for such services on commercial shipments), because the Army-operated piers were "private" rather than "public" facilities, is entirely without merit.

As a general rule, railroads do not undertake to unload carload freight and this is the obligation of the shipper. *Barringer & Co. v. United States*, 319 U. S. 1, 3. However, under special circumstances, as pointed out in that case, they may do so with or without any change in the applicable line-haul freight rates. The extra service may be accorded to some shippers, or on certain types of freight, and not to others. This does not *ipso facto* result in a violation of the statute so long as all shippers in the same circumstances are treated alike. But the service must be covered by provisions of the governing tariffs.

One of the exceptions to the general rule is the free unloading of export traffic by railroads on

their own piers or on public piers. As the Commission found in this case (289 I. C. C., 57-58), the railroads assume the cost of such service only to the extent provided in their tariffs. Free unloading and wharfage privileges are not extended to private piers, i. e., those owned and operated by shippers for the handling of their own traffic and not open to all shippers on equal terms. Railroads serving the port of Norfolk and other North Atlantic ports make provision in their terminal tariffs for loading and unloading export and import traffic subject to certain limitations. Line-haul carriers that do not reach the port of Norfolk do not participate in and have no control over the port services provided for in local terminal tariffs (289 I. C. C., 58). The only reference to such service is to be found in the terminal tariffs of the carriers serving the port which assume the obligation of providing the port services without additional charge. (Tr. 325, 329, 356, 371, 503.)

Railroads serving Norfolk provide piers where export freight can be delivered to steamship lines and under certain conditions the cars will be unloaded by the rail lines. However, the railroads do not provide piers or unloading services generally, but assume these obligations only within the limits specified in their tariffs. Such terminal tariffs of the railroads are the only sources of an obligation to perform wharfage and handling and they do not authorize or require the

railroads to make any allowances for such service on the military traffic passing over the piers controlled by the Army (289 I. C. C., 60-61).

I. Applicable Railroad Tariffs Compelled the Commission's Decision

The tariffs applicable to the traffic here involved (289 I. C. C., 58-59) specifically provide that railroads will absorb the cost of wharfage and handling service on freight (1) when delivered to vessels over wharf properties owned or leased by Stevenson & Young and operated by this concern as a public terminal facility of the rail carriers, and (2) when Stevenson & Young, acting in the capacity of a public wharfinger, furnishes wharfage facilities and performs handling services, for account of and as agent for the railroads, on traffic that is neither consigned to or from nor owned or controlled by Stevenson & Young.

The evidence of record clearly shows that free wharfage and handling could not have been accorded on the involved traffic because the facility over which it moved was not owned or leased to Stevenson & Young, nor operated by them as a public terminal. Neither was the traffic handled by Stevenson & Young acting in the capacity of a public wharfinger as agents of the railroads. All of the traffic here involved moved over piers operated under the exclusive control of the Army.

Furthermore, all of the export tariffs affecting the shipments here involved, with the single exception of traffic handled directly from railroad stations to steamship piers (with proof of exportation), apply only to traffic "which does not leave the possession of the carrier." Tariff 80-C, ICC 694, C. W. Boin, Agent, effective April 10, 1950.³ The evidence contained in the record, including that presented by the Army, shows conclusively that the Army took possession of military freight as it arrived at the port and exercised exclusive control over its movement into and out of the Army Base terminal (289 I. C. C., 60-63; Tr. 19, 35-37, 44-46, 222-225, 245-249, 261-262).

It is respectfully submitted that since the export freight here involved passed out of the possession of the railroads and into that of the Army as shipper, it would have been a tariff violation for the railroads to furnish free wharfage and handling on such freight. The Commission has so held in a number of cases, including *Rukert Terminals Corp. v. B. & O. R. Co.*, 283 I. C. C. 5 and 286 I. C. C. 485, and *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 191 I. C. C. 727. See also *Norfolk Port Comm. v. C.*

³ The exception to the custody rule referred to was of no practical use to the Army (Tr. 390-391) because in making use of it a shipper had to transport his freight from a railroad station to the pier, and he would, in that event, lose the right to receive the free wharfage and handling services which are sought in this case.

& O. Ry. Co., 159 I. C. C. 169, holding that although the railroad was required to apply the export rates to freight moving over the Army Base terminal (operated as a public terminal) yet it was not required to furnish free wharfage and handling services (Tr. 300, 301). The Commission further held in *Newark, N. J., Chamber of Commerce v. P. R. R. Co.*, 206 I. C. C. 555, that railroads are not required to unload export freight on piers controlled by the shipper.

Not all export freight is entitled to export rates, and there is no inherent right that a lower rate be accorded on freight for overseas destinations. *Alden Coal Co. v. Central R. Co. of New Jersey*, 256 I. C. C. 401, 414. However, the Army was accorded the lower export rates on military traffic passing through the Army Base by reason of a concession made to it by the railroads for war purposes, at the "urgent request" of Army, even though the Army took possession of its traffic. This advantage was given to the Army by means of special tariff provisions (Tr. 305-308, 382-383). Private shippers who take possession of their freight, as the Army did, lose the advantage of such export rates. Instead of being treated unfairly, as claimed, the Army was given advantages which would have been unlawful if accorded to any other shipper (289 I. C. C., 63; Tr. 229, 236, 378-383).

The Commission found (289 I. C. C., 65) that the railroads, being prevented from performing

the unloading services by the action of the Army, were released from whatever duty they might otherwise have had. Under such circumstances, there is no obligation upon the railroads to make allowances to the shipper for unloading and wharfage: *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199. Even if the Army had permitted the railroads to perform this service, they could not have done so at their operating convenience, in continuous movement, without interruptions and interferences required to meet the shipper's convenience. When these incidents occur, the railroads are relieved from furnishing whatever terminal services their tariffs might provide. The Commission so held in this case, citing as authority the decision of this Court in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402 (289 I. C. C., 65-66).

In view of the foregoing, it is submitted that the railroads were not obligated to meet the special Army requirements for handling its freight, and that it was neither unreasonable nor discriminatory for the railroads to refuse to accord the Army free unloading or wharfage service on its shipments. The Army was accorded the same treatment as any other shipper in the same position with respect to wharfage and handling service (289 I. C. C., 61).

Appellant contends (Jurisdictional Statement, p. 15) that the Commission's order, approving

the action of the railroads in refusing to absorb wharfage and handling costs on the involved traffic, is discriminatory and prohibited by Section 2, and unreasonable in violation of Sections 1 and 3 of the Act, because the Government has been required to pay twice for the service, i. e., once to the carrier as part of the line-haul rate and a second time to the terminal company.

It is submitted that the line-haul rates are not unreasonable or unlawful under Sections 1 and 3 of the Act, when the wharfage and handling services were not accorded. The Army's witnesses at the hearing before the Commission admitted that the rates are made without consideration of wharfage and handling services (Tr. 378). The evidence shows conclusively that the line-haul rates do not segregate any element of cost or charge for port services and that they are the same whether or not free handling and wharfage are accorded (Tr. 325-329, 356, 371, 503, 531). No inequality was shown to exist. *Wight v. United States*, 167 U. S. 512. In any event the difference in treatment of shippers is not unlawful if all shippers similarly situated are treated alike. *Barringer v. United States*, *supra*. Therefore, the Commission's finding that no discrimination had been shown under Section 2 of the Act is entirely substantiated by the record.

The tariff provisions here involved present a factual question for the determination of the

Commission since differences in conditions may justify differences in the railroad rates or services. *United States v. Wabash R. Co.*, 321 U. S. 403, 411.

The Commission has been interpreting tariffs for many years and such interpretation by a body of experts on transportation problems will be accepted by the courts if it is reasonable in the light of transportation practices. *Texas & Pac. Ry. Co. v. American Tie Co.*, 234 U. S. 138, 146; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 292; *Western & Atlantic R. R. Co. v. Public Service Comm.*, 267 U. S. 493, 497; *United States v. American Sheet & Tin Plate Co.*, *supra*.

II. The Decision Below Is Not Inconsistent With the Decision of the Court of Appeals for the District of Columbia in *United States v. Interstate Commerce Commission*, 198 F. 2d 958

Appellant relies heavily upon the above case as a ground for the reversal of the District Court in upholding the validity of the Commission's order in the instant case. It is contended at pages 14-15 of appellant's Jurisdictional Statement that there is no substantial difference between the two cases and that the judgment of the three-judge district court in the instant case is "irreconcilable with principles declared by the Court of Appeals for the District of Columbia in the first case." We submit that there is no such conflict. The Commission recognized and pointed out the

difference in the two cases as follows (289 I. C. C., 50):

The proceeding herein is a different case from that referred to above, and relates to shipments moving since May 1, 1951, long after our action in the prior proceeding had become subject to court review, and some 7 months before that case was argued to the court of appeals. The tariffs and physical operations, with respect to complainant's shipments here involved, materially differ from those involved in the prior proceeding, as is more fully set forth hereinafter. The only similarity between the two proceedings is that practically the same parties oppose each other, the same general character of commodities are involved, and the place where switching operations occurred is the same. * * *

The Commission pointed out that in reaching its conclusions in the instant case it had taken into consideration the opinion of the Court of Appeals in the prior case. It stated (p. 51) that:

* * * Consideration and decision in the prior proceeding does not legally relate to or control the consideration and decision herein. It is not believed that the decision and opinion of the court of appeals in the prior case, is determinative of the factual and legal questions presented herein. However, our consideration and action in this proceeding will carefully take notice of the opinion of the court of appeals in the

prior proceeding, and conform to legal principles therein stated, as we understand them to apply to the facts and legal situations here involved.

It is submitted that a study of the two opinions clearly reveals that the Commission's opinion in the instant case is in strict harmony with the opinion of the Court of Appeals in the prior case. In the earlier case, the Court set aside the Commission's order on the ground that it was not supported by adequate findings, and that the evidence did not support the findings (1) that the tariffs then in effect did not require the railroads to provide wharfage and handling service on military traffic there involved, and (2) that the railroads' failure to do so did not result in a violation of any section of the Act (192 F. 2d 968, et seq.). Since this decision, there has been a new hearing and decision by the Commission in this prior case.

The earlier case was heard during World War II, when full information was not available or could not be presented. Upon the hearing in the instant case, full information was presented, particularly evidence that railroad facilities at Norfolk were adequate since May 1951 to accommodate military freight. The Commission's finding of such adequacy since May 1951 is supported by substantial evidence. The Court of Appeals in the prior case had considered that there was insufficient evidence to support a find-

ing that the railroad piers during World War II were adequate to handle military freight without regard to the Army's piers.* 192 F. 2d 972. Upon the Commission's rehearing of the earlier case, held pursuant to the Court of Appeals' order, full evidence as to the adequacy of railroad piers was presented, resulting in a finding of such adequacy by the Commission. (289 I. C. C. 63.) The defects pointed out by the Court of Appeals in the Commission's prior decision and order have been remedied on the rehearing.

Due to the foregoing reasons and particularly the finding that the railroads have had ample port facilities to handle all the Army traffic moving over their own facilities at Norfolk "at least on and since May 1, 1951", and for the reasons stated in the Commission's report, the instant case is clearly distinguishable from the prior case.

The three-judge district court was warranted in holding that in the instant case the opinion of the Court of Appeals "does not impel reversal of the Commission's order in this case" (132 F. Supp. 35) and that (p. 36):

* * * The record before the Commission and the Commission's findings in the instant case are not inadequate, as they were held to be in the earlier proceeding, and the facts herein are vitally different. As

* The Court of Appeals' decision in the prior case was influenced by that view of the case.

shown by the Commission's report of June 1, 1953, the Commission in this proceeding took careful notice of the Court's opinion in the prior case and conformed to the legal principles therein stated, insofar as they were applicable to the facts of the proceeding before it.

Perhaps a word should be said with reference to appellant's reliance upon the provisions of Section 6 (8) of the Act as authority for the proposition that the railroads owed the Army the duty of promoting the national defense by adopting "every means within their control to facilitate and expedite the military traffic." In regard to the applicability of section 6 (8) to the issues in this case, we submit that appellant has not shown that any "demand of the President of the United States" was ever made "that preference and precedence shall * * * be given over all other traffic for the transportation of troops and materials of war." Moreover, there is no evidence that the action of the railroads in refusing to accord free wharfage and handling service in any way delayed or impeded the flow of military traffic through the port of Norfolk. By the very terms of Section 6 (8), it is clear that its provision relates to the physical movement of traffic and not to the lawfulness of wharfage and handling charges.

CONCLUSION

This appeal presents no substantial question and the decisions of the Commission and the

court below are clearly correct. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted.

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NOVEMBER 1955.

APPENDIX

Pertinent provisions of the Interstate Commerce Act

SEC. 1 (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 1 (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable

terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 2 That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided however*, That this paragraph shall not be construed to apply

to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 6 (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee * * * .

SEC. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as

defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

CERTIFICATE OF SERVICE

I, Samuel R. Howell, counsel for appellee Interstate Commerce Commission, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of November 1955, I served copies of the foregoing Motion to Affirm on the parties to this proceeding as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes with first-class postage prepaid to:

Honorable Simon E. Sobeloff,
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General of the United
States

Department of Justice
Washington 25, D. C.

Daniel M. Friedman, Esq.
Frederica S. Brenneman, Esq.
Attorneys
Department of Justice
Washington 25, D. C.

2. On the intervening railroad defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorney of record, as follows:

Charles P. Reynolds, Esq.
Shoreham Building
Washington, D. C.

A. J. Dixon, Esq.
General Attorney
Southern Railway System
Washington 13, D. C.

Hugh B. Cox, Esq.
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